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## DETERRENCE OR DISGORGEMENT? READING *CIRAOLLO* AFTER *CAMPBELL*

ANTHONY J. SEBOK\*

### I. DETERRENCE WITHOUT PUNISHMENT: THE IDEA OF SOCIALLY COMPENSATORY DAMAGES

In *Ciraolo v. City of New York*,<sup>1</sup> Judge Guido Calabresi had the opportunity to apply the teachings of Professor Guido Calabresi to the problem of punitive damages. The case presented a single, relatively simple question of statutory interpretation, which Judge Calabresi converted into an extremely interesting discussion about the nature of the function of deterrence in punitive damages.

The issue presented in *Ciraolo* was whether the City of New York could be held liable for punitive damages under 42 U.S.C. § 1983.<sup>2</sup> Debra Ciraolo was one of many people strip searched after being arrested by the New York City police and brought to the Manhattan Detention Center.<sup>3</sup> Because Ciraolo was only arrested for a misdemeanor, the police had no right to strip search her unless they had a reasonable suspicion that she was concealing a weapon or contraband.<sup>4</sup> In her suit, Ciraolo argued that the strip search was established police policy and that the city had adopted the policy in the face of settled law of the Second Circuit.<sup>5</sup> At trial, the judge instructed the jury that punitive damages could be awarded against the city if they found that the city had acted maliciously or wantonly in adopting the policy.<sup>6</sup> The jury rejected a variety of Ciraolo's claims in common-law tort (such as battery), but awarded her \$19,645 in compensatory damages for the rights violation and \$5,000,000 in punitive damages.<sup>7</sup>

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1. 216 F.3d 236 (2d Cir. 2000).

2. *Id.* at 237.

3. *Id.*

4. *Id.* at 238 (citing *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986)).

5. *Id.* at 237-38.

6. *Id.* at 238.

7. *Id.*

The city appealed the punitive damages award. It argued that municipalities are ordinarily immune from punitive damages under § 1983.<sup>8</sup> Ciraolo answered that the Supreme Court had indicated that punitive damages under § 1983 are permitted where it can be shown that the municipality's taxpayers were "directly responsible" for the abuse of the plaintiff's civil rights.<sup>9</sup> Judge Calabresi, writing for a unanimous court, held that the policy adopted by the City of New York did not fit into the narrow exception cited by Ciraolo.<sup>10</sup>

Judge Calabresi then concurred with his own opinion, and argued that the Supreme Court's reasons for immunizing municipalities from punitive damages in § 1983 actions were inconsistent with the policies behind the statute and its own reasoning in *Newport*.<sup>11</sup> The Court had held in *Newport* that one purpose of § 1983 is to deter wrongdoing by government, and that punitive damages can, in theory, promote that purpose, because one function of punitive damages in common law is deterrence.<sup>12</sup> However, the Court concluded that due to particular features of decisionmaking by municipalities, punitive damages do not actually deter wrongdoing by the government any more than the payment of actual damages.<sup>13</sup>

I agree with Judge Calabresi's ultimate conclusion that the Supreme Court made a mistake in *Newport*, and that this mistake was the result of a misunderstanding of the purposes of punitive damages and how those purposes should be evaluated under federal law.<sup>14</sup> At the end of this Article, I will return to the question of why punitive damages should be allowed under § 1983. For the moment, I am interested in Judge Calabresi's reasons.

Judge Calabresi argued that the Court misunderstood the relationship between punitive damages and deterrence. The Court admitted that punitive damages, if they in fact deterred municipalities,

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8. *Id.* The city relied upon *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Ciraolo, 216 F.3d at 238.

9. Ciraolo, 216 F.3d at 238 (quoting *Newport*, 453 U.S. at 267 n.29).

10. *Id.* at 240-42.

11. *Id.* at 242-50 (Calabresi, J., concurring).

12. *Newport*, 453 U.S. at 268.

13. *Id.* at 268-70. The Court argued that (1) it was not obvious that municipal officials would be deterred by payments borne by taxpayers; (2) even without punitive damages, municipal officials who commit constitutional torts might be replaced by voters angered by compensatory judgments; (3) punitive damages assessed against municipal officials in their personal capacity would be more effective; and (4) punitive damages might result in grave financial injury to cities. *Id.*

14. See Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163 (2003).

would fit within § 1983's statutory goals.<sup>15</sup> The Court found that it is highly unlikely that the threat of punitive damages would deter misconduct by municipalities, because officials inclined to do wrong are unlikely to be affected by any backlash by voters.<sup>16</sup> The Court took this view because it assumed that voters would react to rights violations by municipal officers in proportion to the moral wrongfulness of the violation, not its cost to the municipality. Therefore, the deterrent effect of a court award would not be increased by adding a penalty to the compensatory damages that normally accompany a finding of liability.<sup>17</sup> Judge Calabresi argued that the Court "neglected" at least one additional way that a punitive damages award would be interpreted by voters.<sup>18</sup> He noted that they would not see it just as a measure of the wrongfulness of the injury suffered by the plaintiff, but also as an unjustified municipal expense, for which the officials who incurred it should be held answerable, in the same way that they would be held answerable had they run up a huge debt or squandered the municipality's money on something expensive and wasteful.<sup>19</sup>

The theory of deterrence cited by Judge Calabresi is well-known; it says nothing more than that agents can be incentivized into adopting safe practices out of fear that they will be punished by their principal if their actions result in net losses to the principal.<sup>20</sup> As Judge Calabresi noted, courts have sometimes cited this specific theory of

15. *Newport*, 453 U.S. at 268. The Court found that there was no evidence that the framers of § 1983 intended it to authorize punitive damages, and that when the law was adopted by Congress in 1871 municipalities were generally shielded from liability for punitive damages in tort. *Id.* at 260.

16. *Id.* at 268-69. The Court also noted that it is unlikely that the officials would be deterred by the threatened possibility that they would have to indemnify the municipality for the damages it paid. *Id.* Given that these same officials were not, by definition, deterred by the threat of personal liability, this assumption seems fair.

17. *Id.* at 269-70. The Court suggested that the punitive damages awards would have their effect (if at all) because they would cause "shame and humiliation" in the officials. *Id.* at 269. In his concurrence in *Ciraolo*, Judge Calabresi noted that the *Newport* Court thought that deterrence is "an incidental byproduct of punishment," where punishment is a synonym for retribution. *Ciraolo v. City of New York*, 216 F.3d 236, 248 (2d Cir. 2000) (Calabresi, J., concurring).

18. *Ciraolo*, 216 F.3d at 243 (Calabresi, J., concurring).

19. As Judge Calabresi noted:

Assuming that a city is at least minimally rational in its decisionmaking, it will be better able to assess the relative social costs and benefits of a particular municipal policy if it knows that it will bear all, rather than some, of the costs of that policy. . . . [W]hen taxpayers must pay more and get less in return they . . . make their displeasure known.

*Id.* at 249 (Calabresi, J., concurring).

20. See, e.g., A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 949-53 (1998).

deterrence in explaining the function of punitive damages in cases involving corporate malfeasance.<sup>21</sup> Why couldn't the Court see this?

The reason is that in *Newport*, adopting this version of deterrence probably would not have made a difference. The Court may have reasonably believed that, from the ex post perspective, the compensatory award alone probably would have been large enough to evoke whatever reaction from the voters Judge Calabresi argued should result after municipal officers do something wrong.<sup>22</sup> The plaintiff, a concert promoter, claimed that the City of Newport had interfered with the performance of the band Blood, Sweat, and Tears because of concerns that amounted to "content-based censorship," and that this interference resulted in lower ticket sales for the concert.<sup>23</sup> The jury awarded the plaintiff \$72,910 in compensatory damages, which presumably represented the loss of ticket sales proven at trial.<sup>24</sup> It also awarded \$200,000 in punitive damages against the municipality, of which seventy-five percent were attributed to the federal civil rights violation and the remaining twenty-five percent as punishment arising from pendant state law claims.<sup>25</sup> If it were true that voters, being rational actors, would be ready to punish the Mayor of Newport for having wasted the city's money, then the compensatory damages awarded by the jury should have been enough to deter the mayor. Had he thought about it, and been more careful with his exercise of power, he would have realized that his actions would not have prevented the concert and would have only created a deadweight loss of \$72,910 for the promoter in lost ticket sales, which the city would have to pay in the end. The compensatory award represented the entire injury resulting from the mayor's wrongful act, and therefore the entire loss for which the city would be responsible.

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21. *Ciraolo*, 216 F.3d at 249 n.10 (Calabresi, J., concurring) (citing *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 476 (N.J. 1986)).

22. *Newport*, 453 U.S. at 269.

23. *Id.* at 252. The promoter and the city had agreed that a series of jazz concerts would be presented during the summer in a city park. *Id.* at 249-50. When one of the jazz acts had to cancel, the promoter sought to replace it with Blood, Sweat, and Tears. *Id.* at 250. The city objected to this substitution because Blood, Sweat, and Tears was a rock band, not a jazz band. *Id.* The plaintiff at first tried to persuade the city that Blood, Sweat, and Tears was a jazz band, and after having failed to convince the city of this, objected to the city's wholesale discrimination against rock bands. *Id.* at 250-52. (The city may have been wrong about the Fourteenth Amendment, but it seemed to have had the better of the argument about what counts as jazz.)

24. *Id.* at 253.

25. *Id.* at 253 & n.6. The jury also awarded \$75,000 in punitive damages against seven city officials. *Id.* at 253.

Municipal managers, like corporate managers, would not need to be threatened with extracompensatory damages if the taxpayers were forced to pay every dollar of injury caused by their managers. But, in the real world, not every wrongful act is redressed. There is often a nontrivial possibility that a wrongful act that causes injury will not be recognized as such by its victim, or that even if recognized as a wrong, the victim will not want to bring a lawsuit, will not be able to bring a lawsuit, will be barred from bringing a lawsuit (due to procedural constraints), or, for reasons having nothing to do with the true merits of her claim, will lose the lawsuit.<sup>26</sup> All these reasons make the problem of underdeterrence quite real.

Even in a case involving a single victim, sometimes compensatory damages are insufficient to incentivize a manager towards acting in the principal's best interest. Although the Supreme Court did not think so, *Newport* is a good example of why this is so. Members of the Newport City Council and the mayor apparently were afraid that a rock band (as opposed to a jazz band) would attract a rowdy crowd that would result in nontrivial expenses to the city.<sup>27</sup> It is reasonable to presume that, rather than simply acting on personal animus against rock music, they tried to prevent the concert because they hoped to save the taxpayers of Newport some amount of money (\$A). This savings, however, could only be obtained by violating the promoter's civil rights, and they may have thought that the chances of the city being successfully sued ( $p$ ) were so low that it was worth risking a liability of  $p \times \$72,910$  (the compensatory damages) in exchange for a gain of \$A.<sup>28</sup> The Supreme Court apparently felt that this sort of case either happened so rarely that it was not worth permitting punitive damages to protect against its occurrence, or it thought that other factors (such as the threat of punitive damages against the individual officers) would ensure that the municipal officers would not be tempted to maximize the welfare of voters by violating the rights of a few.

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26. Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1149 (1989).

27. *Newport*, 453 U.S. at 250.

28. If \$A exceeded  $p \times \$72,910$ , then the city's agents would have been incentivized into violating the Constitution. In such a case, the only way to ensure that the municipality does not externalize the cost of the rights violation is to make it liable for  $1/p \times A$ . *Ciraolo v. City of New York*, 216 F.3d 236, 244 (2d Cir. 2000) (Calabresi, J., concurring) (citing Polinsky & Shavell, *supra* note 20, at 889-90); see also WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 160-63 (1987); Thomas C. Galligan Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3 (1990) [hereinafter *Augmented Awards*].

Judge Calabresi argued that whether the Court was correct in its judgment about the effect of awarding damages in the *Newport* case was irrelevant in *Ciraolo*. He noted that “one aspect of the deterrence function of punitive damages. . . [is] that a wrongdoer bears *all* the costs of its actions,” and this aspect may not have been at stake in *Newport*.<sup>29</sup> There the question of whether to add punitive damages arose only after liability had been proven against the defendant and the only victim had been fully compensated. If the purpose of adding extracompensatory damages was to make sure that the voters of the city understood the true or full cost of their mayor’s reckless conduct, then there was no point to adding any more damages on top of the \$72,910. The full extent of the harm created by the agent on behalf of the principal was conveyed just by compensating the concert promoter (the only one who had suffered an injury). The difference between *Newport* and *Ciraolo* was that, although Debra Ciraolo, like the concert promoter, was fully compensated for the injury caused by the violation of her rights, the chances were overwhelming that, absent a class action, the voters of New York would not pay for all the injuries caused by the city’s officers.<sup>30</sup>

The lesson that Judge Calabresi drew from the Supreme Court’s treatment of the facts in *Newport* was that not all punitive damages serve the same function. As he noted, the classic two functions served by punitive damages are retribution and deterrence.<sup>31</sup> Judge Calabresi equated retribution with punishment, because in both cases the ground of awarding the extra damages is that the defendant’s actions are blameworthy.<sup>32</sup> Usually there is an overlap between the punishment and deterrent functions of punitive awards, which is understand-

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29. *Ciraolo*, 216 F.3d at 243 (Calabresi, J., concurring) (emphasis added).

30. *Id.* (Calabresi, J., concurring). Judge Calabresi noted later in the opinion that “records were kept that allowed the City to estimate that about 65,000 arrestees were subjected to the strip-search policy.” *Id.* at 246 n.7 (Calabresi, J., concurring).

31. *Id.* at 245 (Calabresi, J., concurring). This formulation is now standard. *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Historically, punitive damages ranged across a spectrum of functions, including compensation, vindication, and at least two types of punishment: punishment for purposes of exemplification and punishment in order to deter. Sebok, *supra* note 14, at 195-204. The contemporary literature on the deterrent function of punitive damages is vast. *See, e.g.*, Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 363-70 (2003) (reviewing the various deterrence rationales for punitive damages). The literature on the retributive functions of punitive damages is sparser. *See, e.g.*, Marc Galanter & David Luban, *Poetic Justice: Punitive Damages And Legal Pluralism*, 42 AM. U. L. REV. 1393, 1432-40 (1993) (discussing the retributive rationale of punitive damages).

32. *Ciraolo*, 216 F.3d at 245-46 & n.6 (Calabresi, J., concurring) (agreeing with Polinsky and Shavell’s dichotomy between extracompensatory damages that deter and extracompensatory damages that punish).

able, since sometimes both functions are achieved simultaneously. An award designed primarily to punish an actor for a past act that is wrong can also serve to deter others (or even that same defendant) from repeating his act. But, asked Judge Calabresi, could there be a punitive damages award that deterred but was not punishment?

In theory, the answer must be yes: The backward-looking function of retribution is logically independent of the forward-looking function of deterrence. Judge Calabresi defined the goal of deterrence as the elimination of "activities whose social costs exceed their social benefits."<sup>33</sup> When the fear of compensatory damages is enough to eliminate activities whose social costs exceed their social benefits, as in the classic application of the Hand Test in the *Carroll Towing*<sup>34</sup> case, then deterrence is achieved through damages that are neither extracompensatory nor retributive.<sup>35</sup> On the other hand, as noted above, if an actor does not expect to be held responsible for the injuries caused by her socially inefficient activity, she might nevertheless engage in it. In such a case, holding an actor liable for more than the damages that were caused to the parties actually suing her might be the only way to ensure that socially inefficient actions are deterred. In such a case, extracompensatory damages would be required.<sup>36</sup>

Extracompensatory damages might be determined in one of two ways. The first method would require someone, *ex ante*, setting a sanction such as a penalty. If the designers of a damages scheme wanted to protect against underdeterrence, they might choose to attach a penalty to a finding of liability, such that the actor would pay compensation to the victims who did sue her, and a "kicker," either to the plaintiffs who sued her or to a third party, such as the state.<sup>37</sup> In fact, I take it that this is what Professor Calabresi had in mind when he employed the idea of "penalties" in the context of "specific deterrence."<sup>38</sup> These penalties would be the means by which society would deter specific activities that it collectively deemed undesirable. The penalties need not be fixed: treble damages, which are calculated after the injury caused by the wrongdoer has been ascertained, are a

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33. *Id.* at 243 (Calabresi, J., concurring) (citing, among others, GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) [hereinafter *THE COSTS OF ACCIDENTS*]).

34. *United States v. Carroll Towing Co.*, 154 F.2d 164 (2d Cir. 1947).

35. Polinsky & Shavell, *supra* note 20, at 878-84; see also Dan B. Dobbs, *Ending Punishment in Punitive Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 845 (1989).

36. *Ciraolo*, 216 F.3d at 245 (Calabresi, J., concurring) (citing *Kemezy v. Peters*, 79 F.3d 33, 35 (7th Cir. 1996)).

37. JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 153-65 (1988).

38. See *THE COSTS OF ACCIDENTS*, *supra* note 33, at 110.



form of penalty. Under this reasoning, the punitive damages recommended by Polinsky and Shavell are a type of penalty, too, since they are based on a multiplier derived from circumstances known (or knowable) to the actor before he acts.<sup>39</sup> Even traditional punitive damages, which cannot be ascertained in advance of the wrongdoer's action, are a form of penalty, albeit one that, because of the unpredictability of punitive damages, may not serve the goal of efficient deterrence very well.

All these methods are, loosely speaking, punishment. In each case, a quantum of damages that is determined independently of the injury caused by the defendant is assessed against the defendant. The defendant's liability for the additional quantum of damages (the penalty) is justified on the ground that the defendant acted wrongfully—that is, had the opportunity to assess the conditions under which the penalty would be applied and went ahead with the act nevertheless.<sup>40</sup> One does not need to adopt any specific theory of punishment to say that the diverse set of penalties described above are all forms of punishment. For example, punishment in the form of treble damages is not retribution, if by retribution one means punishment grounded in notions of desert.<sup>41</sup>

The second method of calculating extracompensatory damages is not as familiar as awarding a penalty, but, as Judge Calabresi pointed out, can serve the goals of efficient deterrence like a well-designed penalty. It would only apply in cases in which the defendant's wrong-

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39. See *supra* note 28 and accompanying text.

40. As Judge Calabresi noted in *Ciraolo*, the category of punishment usually is limited to acts that are intentional. 216 F.3d at 245 (Calabresi, J., concurring). Extracompensatory damages resulting from acts that are not the result of culpable mental states—such as actions for which the defendant is held strictly liable—are not punishment. See *id.* at 245 n.5 (Calabresi, J., concurring) (discussing strict liability and punitive damages).

41. Usually retribution is associated with the idea of desert: that the quantum of punishment received by the wrongdoer is in direct proportion to wrongfulness of her act. See Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 28 (2003). Rubin explains:

Desert is the idea that the criminal should be punished because he did something wrong, that he deserves punishment in the moral sense. It relies on the more general principle that justice prevails when people get what they deserve, that is, what the moral character of their action merits, whether good or bad.

*Id.* (footnote omitted). But even this is ambiguous. Some people use the terms retribution or desert to connote nothing more than the theory that defendants ought to pay extracompensatory damages when they satisfy one very weak condition: that they have acted wrongfully. See Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 40 (1985) ("An important principle of retributive justice is the notion of desert. The desert theory dictates that retributive measures be imposed only when the actor has voluntarily and inexcusably committed a wrongful act." (footnotes omitted)).

ful act causes injuries to multiple victims and only one of the injured sues. A court could, *ex post*, estimate how many other victims the actor actually harmed through the same act, and then multiply the compensation awarded to the plaintiff in the courtroom by the estimated number of victims injured by the defendant's same wrongful act. Judge Calabresi called damages calculated under this method "socially compensatory damages."<sup>42</sup> He noted that this type of extracompensatory damages award is not really a punishment at all, because it subjects the defendant to a liability that is equal to the injury he caused and no greater than what he would have owed had everyone who could have sued him done so.<sup>43</sup> These damages would be "extra" compensatory because the damages awarded would be greater than the damages required to repair the plaintiff, but they would not be punitive, because they would be calculated according to the actual injuries caused by the defendant's act. They do not impose on him a cost greater than that which he has imposed on others. This second method became the focus of Judge Calabresi's concurrence.

Before we examine why it was important for Judge Calabresi to believe that socially compensatory damages are not really punitive damages from a doctrinal perspective, we should note the ways in which the penalties that are designed to deter differ from socially compensatory damages that are also designed to deter. The severity of penalties (which could range from physical punishment to mild rebukes) will obviously vary according to the importance society attaches to the consequence of the socially inefficient act. However, the amount of the penalty is independent of the harm caused by the actor. This is for two reasons. First, the penalty is set *ex ante*, at a time when it may be estimated—but not known—whether the prohibited act caused injuries to anyone but the plaintiff, and how severe those

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42. *Ciraolo*, 216 F.3d at 245 (Calabresi, J., concurring); see Sharkey, *supra* note 31, at 389-91 (discussing damages that would be awarded to compensate the harms caused to society as a whole, which she calls "compensatory societal damages"). Galligan's concept of "augmented awards" straddles the categories of "penalty" and "socially compensatory damages," but a careful reading of his explanation of his theory suggests that he is committed to the former. See Galligan, *Augmented Awards*, *supra* note 28, at 12-13, 62-64 (arguing in favor of augmented awards added to other fines or penalties to ensure that the *ex ante* threat to an actor capable of committing a tort is not "too low"). On the other hand, Galligan does not want to draw too sharp a distinction between his theory of augmented awards and socially compensatory damages; he views the latter as falling within the category of augmented awards. *Id.* at 63; see also Thomas C. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117, 128, 131 (2003) [hereinafter *Deterrence and Punishment*] (discussing Sharkey's theory of societal damages and the goal of plaintiffs pursuing punitive damages to act as a "proxy" for those who cannot sue).

43. *Ciraolo*, 216 F.3d at 245-46 (Calabresi, J., concurring).

injuries are. Second, as Calabresi noted in *The Costs of Accidents*, the point of the penalties is to prevent the activity, "not to give individuals a choice between accident costs and the costs of avoiding them."<sup>44</sup> The actual cost of the activity to society may be the primary reason for using extracompensatory damages to deter it, but once the collective decision has been taken to deter the activity, there is no reason why penalties that exceed the social cost of the activity might not be appropriate, if it is concluded that such measures are needed to deter actors *ex ante*.

Following this logic, Judge Calabresi noted that cases like *Ciraolo* call for the category of extracompensatory damages to be broken into two subcategories. On the one hand, there would be "punitive" damages, which would be awarded "where the defendant's conduct was sufficiently reprehensible to deserve punishment apart from whatever assessment was required to compensate the [plaintiff] or society as a whole."<sup>45</sup> These damages would be, in fact, penalties, although they would take the specific form of open-ended punitive damages awarded by a jury. On the other hand, there would be socially compensatory damages, which would be awarded regardless of the reprehensibility of the defendant's conduct, and would be required to compensate society for its losses apart from whatever assessment was required to compensate the plaintiff.<sup>46</sup>

One of the great advantages of drawing the distinction between punitive damages and socially compensatory damages is alluded to in a footnote in the concurrence. Judge Calabresi noted that "one disadvantage of the current system, which conflates punitive and social deterrence goals, is that what are actually *punitive* damages rather than socially compensatory damages can be awarded without adequate procedural safeguards and imposed on defendants who are not intentionally wrongful."<sup>47</sup> The problem to which Judge Calabresi referred in 2000 had been explored in a litany of cases before the United States Supreme Court concerning the relationship between the Due Process Clause of the Fourteenth Amendment and punitive damages; the last important case as of 2000 was *BMW of North America, Inc. v. Gore*.<sup>48</sup> In that case, the Court had set out a three-part test designed to ensure that no defendant would be held responsible for damages without

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44. THE COSTS OF ACCIDENTS, *supra* note 33, at 121.

45. *Ciraolo*, 216 F.3d at 246 (Calabresi, J., concurring).

46. *Id.* (Calabresi, J., concurring).

47. *Id.* at 246 n.8 (Calabresi, J., concurring).

48. 517 U.S. 559 (1996).

some form of notice.<sup>49</sup> The three-part test instructed courts reviewing punitive damages awards resulting from trial to make sure that the awards were reasonably related (1) to the reprehensibility of the defendant's conduct, (2) to the amount of compensatory damages awarded, and (3) to the remedies or sanctions available under public laws that would sanction the same conduct for which the defendant was required to pay punitive damages.<sup>50</sup> The general concern that the Court had was that, to the extent punitive damages resemble some sort of quasi-criminal punishment, the kind of due process protections that come with criminal punishment should be imported into the practice of awarding punitive damages.<sup>51</sup>

Judge Calabresi, like many, was skeptical of the *Gore* test. His solution was to reclassify a large part of punitive damages practice—the portion that represented an award of socially compensatory damages—as compensatory, thus dissolving the worry about due process rooted in the idea that punitive damages are quasi-criminal. In this Article I want to raise two questions about this solution and examine them in the context of later decisions by the Court concerning the relationship between the Due Process Clause and punitive damages.

## II. WHEN ARE SOCIALLY COMPENSATORY DAMAGES APPROPRIATE?

Judge Calabresi's argument for socially compensatory damages is that extracompensatory damages are sometimes necessary to ensure that actors make socially efficient decisions. As noted above, the calculation of socially compensatory damages is not like the calculation of penalties described in *The Costs of Accidents* in the context of specific deterrence. In fact, it would seem that the calculation of socially compensatory damages is no different from the calculation of primary accident costs described in Chapter Seven of *The Costs of Accidents*.<sup>52</sup>

Treating socially compensatory damages as continuous with the primary accident costs that normally would be treated under general deterrence might seem odd for the following reason. The discussion of socially compensatory damages in the *Ciraolo* case arose within the context of a punitive damages award for an act that a jury deemed malicious or wanton. One might argue that it is precisely such acts of conscious wrongdoing that Professor Calabresi had deemed should have been handled under specific deterrence. Although not stated

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49. *Id.* at 574-75.

50. *Id.* at 575.

51. *Id.* at 568, 574.

52. The chapter is entitled, *Which Activities Cause Which Accident Costs: The General Deterrence Approach*. *THE COSTS OF ACCIDENTS*, *supra* note 33, at 135-73.

explicitly in *The Costs of Accidents*, it would seem that intentional torts, or torts infected by reckless or wanton conduct, would be the sort of activity that would be best handled by penalties.<sup>53</sup>

Judge Calabresi's argument, however, was that some socially inefficient actions might require two kinds of extracompensatory damages—socially compensatory damages and punishment through penalties. *Ciraolo* might be such a case. His key point, however, as I read him, is that the fact that the City of New York's choice to engage in a socially inefficient action was infected by malice (and was not, for example, the result of mere carelessness) should be irrelevant to whether socially compensatory damages are awarded.<sup>54</sup> His argument seems to be based on two very separate lines of argument.

First, as a matter of simple law and economics, it should not matter why an actor imposes a cost on another party if the actor is rational. That is, as set out in the theory of general deterrence in *The Costs of Accidents* and repeated in *Ciraolo*, if the City of New York is a rational actor, and it is capable of controlling its actions *ex ante*, it will not take actions (such as injuring the civil rights of others) that will cost it more than the value that accrues to the city from the actions. Full compensation will deter the careless as well as conscious rights violator, assuming that the cheapest cost avoider is the city (a not unreasonable assumption, given the easy availability of lawyers to the city).

Second, Judge Calabresi suggested in *Ciraolo* that earlier courts had already intuitively understood that sometimes punitive damages should be awarded because they functioned as socially compensatory damages. Judge Calabresi cited two cases, *Grimshaw v. Ford Motor Co.*<sup>55</sup> and *Fischer v. Johns-Manville Corp.*,<sup>56</sup> to illustrate that punitive damages

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53. See *id.* at 269-70 (arguing for noninsurable penalties for drunken drivers).

54. Judge Calabresi argued that

socially compensatory damages might be permitted in cases in which all the costs of a defendant's actions were not before the court, whether or not the defendant's conduct was particularly blameworthy. But a separate award of *punitive* damages would be allowed only in cases where the defendant's conduct was sufficiently reprehensible to deserve punishment apart from whatever assessment was required to compensate the individual victim or society as a whole.

*Ciraolo v. City of New York*, 216 F.3d 236, 246 (2d Cir. 2000) (Calabresi, J., concurring) (footnote omitted). This is why the Supreme Court's judgment that voters' anger about the wrongfulness of their municipal officers' actions would not be intensified by the additional awarding of punitive damages ended the question of whether to award extracompensatory damages too soon: there still remained the separate question of whether the voters would respond to the fact that the officers had, for whatever reason, wasted the municipality's money.

55. 174 Cal. Rptr. 348 (Ct. App. 1981).

56. 512 A.2d 466 (N.J. 1986).

were already awarded "in situations in which the injurer, though liable, was not intentionally or wantonly wrongful."<sup>57</sup> His point, I take it, is that by 2000 the common law recognized the more expansive social compensatory purposes of punitive damages when it embraced punitive damages in cases where the defendant had not evinced the kind of malice or recklessness seen in *Ciraolo*.

The question I would raise about the application of principles of general deterrence to socially compensatory damages is that it looks like an odd fit. I will start with Judge Calabresi's second argument first, because it is a simple historical claim, and one that seems clearly wrong. It is not the case that common-law courts award punitive damages "in situations where the injurer, though liable, was not intentionally or wantonly wrongful." To suggest otherwise is to simply mischaracterize modern doctrine.<sup>58</sup> Furthermore, the examples offered by Calabresi in no way aid his argument. The juries in both the *Grimshaw* and *Fischer* cases were instructed that they could award punitive damages if, in addition to finding that the plaintiff had satisfied the test for strict products liability, they also found that the defendants had acted wantonly or with malice.<sup>59</sup> It might be the case that the socially compensatory damages rationale should apply to cases in which there is underdeterrence but no conduct that would otherwise qualify for retribution, but that is not the law today. The universe of cases to which Judge Calabresi applied his argument were cases, like *Ciraolo*, in which the defendant was a conscious (or consciously indifferent) actor who also happened to hurt more people than later sued.<sup>60</sup>

The conclusion that we can draw from the discussion above is that the argument for socially compensatory damages in *Ciraolo* is almost wholly normative, not descriptive. If, following Judge Calabresi, one insists on distinguishing between extracompensatory damages that take the form of punishment and those that take the form of socially compensatory damages, then except for class actions the law

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57. *Ciraolo*, 216 F.3d at 245 n.5 (Calabresi, J., concurring).

58. See, e.g., DAN B. DOBBS, THE LAW OF TORTS § 381, at 1062 (2000) (stating that punitive damages "are usually available only when the tortfeasor has committed quite serious misconduct with a bad intent or bad state of mind such as malice").

59. *Grimshaw*, 174 Cal. Rptr. at 385-87; *Fischer*, 512 A.2d at 481.

60. Professor Sharkey, who develops an argument similar to Judge Calabresi's argument, does not go as far as Judge Calabresi. She proposes a system of extracompensatory damages that serve a similar deterrent function as that laid out by Judge Calabresi, but she suggests that only defendants who have been found to have engaged in intentional or reckless conduct could be held liable for socially compensatory damages. See Sharkey, *supra* note 31, at 405.

does not award socially compensatory damages.<sup>61</sup> There is nothing especially peculiar about Judge Calabresi making a normative argument in *Ciraolo*; his argument seems to be a version of the argument that he made as an academic. That is, regardless of what *Grimshaw* actually says, Judge Calabresi can argue that what it should have said was that manufacturers of products that are inefficient from the perspective of social welfare ought to be held liable for all the accident costs associated with their products, not just the accident costs of the parties actually in the suit.<sup>62</sup>

The second question I want to raise is whether the model of socially compensatory damages fits the original model of general deterrence in *The Costs of Accidents*. In *The Costs of Accidents*, Calabresi spent a great deal of time discussing the concept of causation as it applied to general deterrence.<sup>63</sup> He pointed out that every accident had at least two causes, the victim and the injurer. The appropriate response to this fact formed part of the underlying structure of the insurance scheme outlined in the book. The discussion of locating the cheapest cost avoider in the context of reciprocal causation assumed that there would be a variety of techniques to measure the risks created by potential actors and the injuries suffered by accident victims.<sup>64</sup> Under a theory of general deterrence, these two questions are separate. The incentive for a cost avoider to alter their conduct might be based on "event-based" interactions, such as the famous "spongy bumper" example, where one party (the car manufacturer) is required to compensate another party (the pedestrian) under a rule that has been selected because it causes manufacturers and pedestrians to make choices that generate the most efficient allocation of resources.<sup>65</sup> The incentive for a cost avoider to alter her conduct might be based on

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61. Galligan has argued that there are many forms of extracompensatory damages in contemporary private law in addition to punitive damages. Galligan, *Deterrence and Punishment*, *supra* note 42, at 119. Some that he lists are simply additional forms of civil punishment, such as multiple damages that are authorized by statute. *Id.* at 121. Some, like the "collateral source rule" and disgorgement of profit in restitution, might be seen as cryptopunishment, although legal commentary does not often classify them this way. *Id.* at 120. For an argument that disgorgement of profits in restitution is not a penalty at all, see Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI-KENT. L. REV. 55 (2003).

62. *Ciraolo*, 216 F.3d at 243 (Calabresi, J., concurring). Calabresi recognized that this would create a potentially disastrous windfall and "race to the courthouse" problems. As a solution he suggests paying socially compensatory damages into a public fund instead of directly to individual plaintiffs. *Id.* at 246-47 (Calabresi, J., concurring).

63. See, e.g., THE COSTS OF ACCIDENTS, *supra* note 33, at 6, 135-40, 299.

64. Calabresi discusses these themes in Chapters Seven and Nine. *Id.* at 135-73, 198-235.

65. *Id.* at 136-38.

“activity-based” interactions, such as in the example introduced by Professor Calabresi where driving is considered a cost that the government charges to certain subcategories of citizens (such as drivers).<sup>66</sup> The chapters on general deterrence describe various permutations of these two types of interactions.

Socially compensatory damages seem like an odd merger of these two highly stylized ways of explaining how different kinds of rules can incentivize behavior. In the spongy bumper example, the manufacturer did not pay for the number of accidents that it was hypothesized to have caused. It paid for the actual injuries caused under the strict liability rule. The manufacturer’s total liability costs were a sum of all the injuries in which it had been established it was a cause. While it is true that one can say that socially compensatory damages are nothing more than a summing of all the interactions in which the manufacturer was a *possible* cause of an injury to someone, this is not something that Calabresi says in *The Costs of Accidents*.

The argument for strict liability as a means of achieving general deterrence makes sense: it highlights the way in which the pursuit of the cheapest cost avoider exploits the manufacturer’s freedom to choose whether and how to respond to actual costs associated with actual choices made by the manufacturer. The moment one introduces expected costs caused by the manufacturer—that is, costs not known to have occurred but estimated to have occurred—the manufacturer’s reasons for changing behavior have changed. The manufacturer is responding to an incentive similar to that created by insurance. If the argument for socially compensatory damages is that the defendant ought to pay a certain amount because, according to actuarial science, actions similar to those taken by the defendant cause a certain quantum of damage to victims similar to the plaintiff in the case, then the argument for charging the defendant with socially compensatory damages is similar to the argument for holding manufacturers responsible for a certain tax or insurance premium because they have engaged in a certain activity.

However, socially compensatory damages are an odd kind of tax or insurance premium. They are not calculated on the basis of ex ante risk, but on the basis of an ex post extrapolation from how a specific course of conduct affected a single plaintiff (or a handful of plaintiffs). Furthermore, they suffer from an extremely narrow form of subcategorization.<sup>67</sup> Instead of falling into the risk pool of “all mu-

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66. *Id.* at 145.

67. *See id.* at 145-47 (discussing the proper level of subcategorization).



nicipalities" (in the case of *Ciraolo*) or "all auto manufacturers" (in the case of *Grimshaw*), the defendant is in a risk pool of one—the actor who has been found liable and who is known to have caused an estimated amount of social damage. One could imagine shifting the costs of activity onto actors through insurance or tax-type mechanisms on a case-by-case basis, but Professor Calabresi expressed in *The Costs of Accidents* a strong preference of category determinations over case-by-case determinations.<sup>68</sup>

### III. SOCIALLY COMPENSATORY DAMAGES AND SPECIFIC DETERRENCE

It is time to revisit the question of whether the cases that Judge Calabresi believed ought to be handled by socially compensatory damages are in fact best captured by a system of general deterrence. Perhaps Judge Calabresi, despite his statements to the contrary, should have said that the acts that trigger socially compensatory damages are distinguishable from those that are simply careless and inefficient because they are wrongful or culpable (and inefficient).<sup>69</sup> This would be consistent with the idea, introduced above, that there is an overlap between extracompensatory damages and specific deterrence.

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68. *Id.* at 255-56. The problem I am discussing here is the inverse of the problem raised by Polinsky and Shavell: whether to apply the punitive multiplier to the actual damages suffered by the plaintiff in a tort suit in order to produce the proper level of the defendant's total damages, or whether to apply the punitive multiplier to the expected injury the plaintiff could have suffered. See Polinsky & Shavell, *supra* note 20, at 915. As Galligan notes, the particular plaintiff who brings a suit may not be a typical plaintiff, and hence multiplying her actual damages by the inverse of the probability of detection might produce over- or underdeterrence. Galligan, *Deterrence and Punishment*, *supra* note 42, at 133.

The problem I am raising has to do with whether the defendant's course of conduct was typical of the class of actors to which it belonged. The liability rules that were designed to promote general deterrence in *The Costs of Accidents* were based on generalizations about entire classes of actors. If an actor is held strictly liable for an injury of which his act is a cause, then ideally he should be held liable for an equal share of the total costs of all the injuries that all the actors in his class create. In other words, he should be required to pay into a fund that compensates victims of accidents produced by the class of actors, regardless of which actor caused them. Such a system would impose on all actors all the costs of injuries that are estimated to have arisen from a specific course of conduct by a specific actor. That system in turn would achieve general deterrence by threatening all the actors with the possibility that the same course of conduct could result in strict liability of vastly different sums, for no other reason than random chance.

69. This is Sharkey's position. See Sharkey, *supra* note 31, at 405 (proposing the adoption of an ex post class action procedure in which societal damages would only be imposed if the defendant's actions met a certain requirement of recklessness). But see Galligan, *Deterrence and Punishment*, *supra* note 42, at 142 n.128 (criticizing Sharkey for being inconsistent with the basic premises of her argument, because setting a required level of recklessness relates to notions of punishment, and not efficiency, deterrence, or compensation).

Socially compensatory damages might be viewed as what Professor Calabresi called “postaccident penalizations.”<sup>70</sup> Conduct that society wishes to restrict or limit is penalized by a sanction that is announced after the conduct occurs, although there are general principles that put the actor on notice that a penalty could be assessed.<sup>71</sup> Under this approach, the penalty equals the estimate of all the damages caused by the wrongful act to anyone in society. Although the penalty equals the total cost of the wrongful activity, it is not viewed as a cost of the activity; the social damages are instead a device the tort system uses to stop the defendant from doing an act collectively deemed unacceptable. As Professor Calabresi pointed out, there are other, more severe ways to penalize activities.<sup>72</sup>

The one reason why Judge Calabresi might not have wanted to classify socially compensatory damages as penalties is that he agreed with the Court that, if an extracompensatory damages award is punishment, due process plays a much larger role than if the extracompensatory damages are classified as “mere” compensation.<sup>73</sup> Two questions, therefore, must be answered. Are the costs imposed by specific deterrence always a form of punishment? And, even if they are, why should they be subject to more searching due process constraints than regular compensatory damages?

The penalties imposed by specific deterrence are not obviously punishment in the sense that they are not obviously designed to be retributive. For Professor Calabresi, even a punishment had to serve some welfare-maximization function, and retribution—the idea that wrongdoing is the point of punishment—had no place in Professor or Judge Calabresi’s world.<sup>74</sup> Within the boundaries set out in *The Costs of Accidents*, punishment can serve a welfare-maximizing function. While Professor Calabresi mentioned very severe penalties in his discussion of specific deterrence, he clearly was much more often think-

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70. THE COSTS OF ACCIDENTS, *supra* note 33, at 124.

71. As Calabresi noted:

[S]ince the acts or activities are defined only in general terms before an accident occurs, individuals will, in deciding what acts or activities to engage in, estimate what is likely to be penalized if an accident does occur, and the acts or activities deterred will depend on this estimate.

*Id.* at 128.

72. Such measures include “jail, fines, the whip, the gallows, etc.” *Id.* at 112. These examples were obviously hyperbolic.

73. *Ciraolo v. City of New York*, 216 F.3d 236, 246 n.8 (2d Cir. 2000) (Calabresi, J., concurring).

74. As noted above, to say that wrongdoing is a condition for punishment is different from saying that it is the point of punishment. See *supra* note 41.

ing about taxes and fines.<sup>75</sup> The threat of these can certainly drive actors, on the margin, to avoid prohibited activities.

The problem with analyzing specific deterrence through the lens of punitive damages is that some types of costs that are imposed in order to deter specific activities are clearly not punishment, while some are. Taxes or surcharges on activities may be designed to drive actors away from activities that have been collectively deemed inefficient, but they cannot be described as punishment.<sup>76</sup> Fines imposed because an activity is prohibited do seem to be punishment, and certainly financial penalties associated with certain tort judgments might be described as punishment.

It seems safe to assume, therefore, that a system of specific deterrence might at times employ mechanisms that clearly are punishment, such as penalties designed to prevent certain activities, and not merely to tax them. Clearly, the kind of financial penalties meted out in the form of punitive damages look a lot like the sort of punishment used to promote specific deterrence. Why not view socially compensatory damages as part of the system of specific deterrence?

Judge Calabresi was conscious of the consequences of classifying any kind of damages award as punishment or a penalty. He seemed adamant in note eight of his *Ciraolo* concurrence<sup>77</sup> that socially compensatory damages, being compensatory, did not involve the court in the same convoluted due process problems that had occupied courts since *Pacific Mutual Life Insurance Co. v. Haslip*.<sup>78</sup> Why should it make such a difference whether an actor engaging in an inefficient act is forced to pay the "cost" of that activity in the form of "damages," as required by general deterrence, or in the form of a penalty, as required by specific deterrence? The quantum of various punishments can be calculated within the framework of efficiency, as Judge Calabresi noted when he cited Gary Becker's work.<sup>79</sup>

It may have been that Judge Calabresi was anticipating the Court's decision in the following year in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*<sup>80</sup> In *Cooper*, the Court had to determine under what standard a federal appellate court should have reviewed a

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75. See THE COSTS OF ACCIDENTS, *supra* note 33, at 116.

76. When a consumer is permitted to buy an SUV but is asked to pay a tax, that is not punishment. If the consumer refuses to pay the tax, the sanctions that follow a determination of "tax avoidance" are punishment.

77. *Ciraolo*, 216 F.3d at 246 n.8 (Calabresi, J., concurring).

78. 499 U.S. 1 (1991).

79. *Ciraolo*, 216 F.3d at 243 n.2, 246 n.8 (Calabresi, J., concurring) (citing Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968)).

80. 532 U.S. 424 (2001).

trial court's judgment concerning the constitutionality of the jury's award of punitive damages.<sup>81</sup> According to the Court, "[a] jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation."<sup>82</sup> The Court argued that, because punitive damages awards reflect moral judgments, they are like criminal punishments set by legislatures.<sup>83</sup> Of course, in 1989 the Court held in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,<sup>84</sup> that punitive damages awards were not criminal penalties and therefore could not be reviewed under the Eighth Amendment.<sup>85</sup> However, both punitive damage awards and criminal penalties share something in common: the Due Process Clause of the Fourteenth Amendment. In the context of criminal law, the Eighth Amendment is imposed against the states through the Fourteenth Amendment's Due Process Clause, while in the context of tort law the Due Process Clause is applied directly to the states.<sup>86</sup>

The Court in *Cooper* also suggested that due process constrains the states in criminal law and in tort law in related ways.<sup>87</sup> In criminal law, the states are prohibited from imposing excessive fines and cruel and unusual punishment; in tort law, they are prohibited "from imposing 'grossly excessive' punishments on tortfeasors."<sup>88</sup> A punitive damages award is grossly excessive when it bears no reasonable relationship to the compensatory damages that underwrite it.<sup>89</sup> The Court explained in *Gore* that penalties bearing no reasonable relationship to underlying compensatory damages violate due process, because they (by definition) cannot be anticipated in advance; hence, these penalties violate the basic principle that no one should be punished without prior notice of the penalty.<sup>90</sup> The *Cooper* Court suggested that it had struck down punishments in criminal law because they were "grossly disproportionate" in the same way that a tort penalty could be "grossly excessive."<sup>91</sup> For example, in cases involving the

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81. *Id.* at 426.

82. *Id.* at 432.

83. *Id.* at 432-33.

84. 492 U.S. 257 (1989).

85. *Id.* at 260.

86. *Cooper*, 532 U.S. at 433-34.

87. *Id.*

88. *Id.* at 434 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996)).

89. *Id.* at 433-35.

90. *Gore*, 517 U.S. at 574-75.

91. *Cooper*, 532 U.S. at 433-34.

death penalty, life imprisonment, or forfeiture, the Court had used "the same general criteria" that it adopted in *Gore*.<sup>92</sup>

Judge Calabresi may have been motivated by the same concern that motivated the Court in *Cooper*, which was that decisions about punishment are qualitatively different than decisions about compensation. The Court in *Cooper*, for example, argued that one reason why no court until the twentieth century had held that juries' determinations of punitive damages could be reviewed de novo was because, until the twentieth century, the function served by punitive damages was frequently compensatory, not retributive.<sup>93</sup> As a historical matter, the Court was wrong about whether early courts viewed punitive damages as a form of punishment.<sup>94</sup> The point, however, is that the Court took for granted that punishment requires a special sort of legal reasoning (moral) that places special constraints on what the state can do, and how it does it.

#### IV. WHAT PROCESS IS DUE FOR EXTRACOMPENSATORY DAMAGES?

The characterization of the function of twentieth-century punitive damages by the Court in *Cooper* and extracompensatory damages by Judge Calabresi in *Ciraolo* are different, but they may share a common foundation. The Court felt that punishment, separate from the compensation of the plaintiff, requires normative judgment and thus is not merely a matter of measuring lost wealth or even pain and suffering.<sup>95</sup> Judge Calabresi did not explain his reasons for distinguishing extracompensatory damages that punish from socially compensatory damages in the same terms as the Court. His argument, if it can be traced back to the distinction between general and specific deterrence, must be based on the way that actors are incentivized under the two systems. Under specific deterrence, acts are prohibited or limited.<sup>96</sup> In other words, even in its mildest form, specific deterrence ultimately works by restricting liberty, not by shifting the costs of an activity.

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92. *Id.* at 434-35 (citing *United States v. Bajakajian*, 524 U.S. 321 (1998) (\$357,144 forfeiture excessive for a reporting violation); *Solem v. Helm*, 463 U.S. 277 (1983) (life imprisonment excessive for nonviolent felony); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty excessive for robbery leading to murder); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty excessive for rape)).

93. *Id.* at 437 n.11.

94. I discuss the historical functions of punitive damages in another article. See Sebok, *supra* note 14, at 195-204.

95. *Cooper*, 532 U.S. at 437-38 & n.11.

96. THE COSTS OF ACCIDENTS, *supra* note 33, at 95-96.

The rationale for imposing penalties according to specific deterrence may not be the same as the rationale for imposing punishment under the Court's theory in *Cooper*. Penalties are imposed under specific deterrence to prevent certain acts either by the actor or other future actors. In that sense, the penalty is clearly not based on the cost of the activity as between the actor and his or her victim, but on some other measure. The punishments that the Court may have had in mind in *Cooper* could have been based on an entirely different, retributive measure. But what the two systems of penalties have in common is that neither the ground for the imposition of damages, nor the quantum of damages for which the defendant is responsible, are conditioned on the cost of the interaction between the actor and his or her victims. The ground is instead the failure of the actor to have conformed his or her conduct in a certain way, and the quantum of damages is based on some independent scale, either of reprehensibility (in the case of *Cooper*) or of total social injury (in the case of *Ciraolo*).

So the question posed by *Ciraolo* can be reframed as follows: If socially compensatory damages are penalties within the logic of specific deterrence, are they consistent with due process? According to the Court, the answer is probably "no," although it is not as easy to discern the Court's true views given the murky arguments it has provided until now.

The clearest statement by the Court on this question comes out of *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>97</sup> The case involved a suit by an insured against his insurer for failure to settle in good faith a claim arising from a fatal car accident.<sup>98</sup> The jury awarded Campbell \$2.6 million for emotional distress suffered as a result of the bad faith and \$145 million in punitive damages.<sup>99</sup> Both awards were reduced by the trial judge.<sup>100</sup> The Utah Supreme Court then reinstated the punitive damages award on the grounds that the jury's assessment of punitive damages was justified under *Gore*.<sup>101</sup>

Justice Kennedy, writing for a six-member majority, conceded that the trial record could support the claim that State Farm's treatment of Campbell merited punitive damages.<sup>102</sup> Justice Kennedy was quite critical of the decision by the lower courts to take into account

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97. 538 U.S. 408 (2003).

98. *Id.* at 412-14.

99. *Id.* at 415.

100. *Id.*

101. *Id.* at 415-16.

102. *Id.* at 419.

what he called "conduct that bore no relation to Campbells' harm."<sup>103</sup> Evidence of this conduct, which included evidence of out-of-state activities that, if true, harmed the interests of a wide range of State Farm's customers and other third parties around the country, was introduced to satisfy the "reprehensibility" prong of the *Gore* test.<sup>104</sup> Justice Kennedy noted that this conduct was not identical to the conduct that harmed Campbell.<sup>105</sup> He argued that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis."<sup>106</sup>

The problem with Justice Kennedy's argument, as he was well aware, is that *Gore* did allow courts determining punitive damage to take into account duplicative wrongful behavior that harmed non-plaintiff parties.<sup>107</sup> Justice Kennedy could hide behind the fact that the conduct attributed to State Farm by Campbell at trial was not literally duplicative.<sup>108</sup> The ambiguity in Justice Kennedy's statement above, however, is that it is not clear whether due process forbids the consideration of *hypothetical* claims by nonpresent victims against the defendant (which would exclude even duplicative acts of wrongdoing), or the consideration of *unrelated* claims (which could, in theory, permit hypothetical but identical claims).<sup>109</sup> If Justice Kennedy's position is the latter, then Judge Calabresi's socially compensatory damages would not be barred by the Due Process Clause, despite the fact that they are a type of penalty designed to promote specific deterrence. If Justice Kennedy's position is the former, and the Court's current position on due process and punitive damages is right, then it seems that the only way that Judge Calabresi could justify socially com-

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103. *Id.* at 422-23.

104. *Id.*

105. *Id.* at 423-24. The conduct concerning other parties differed because some of it involved first-party, not third-party, insurance, and most of it did not involve car insurance.

106. *Id.* at 423.

107. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576-77 (1996). In fact, the final punitive damages award resulting from the rehearing of the *Gore* suit by the Alabama courts awarded the plaintiff \$50,000. *BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 515 (Ala. 1997). This is 12.5 times the plaintiff's economic damages (\$4,000), and close to the cost of the plaintiff's economic damages multiplied by the number of cars with the same defect as the plaintiff's that BMW sold in Alabama (14 x \$4,000=\$56,000).

108. *Campbell*, 538 U.S. at 423-24 ("[B]ecause the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis."). The Campbells had alleged that State Farm had refused to settle in good faith a claim brought under their automobile liability policy, but had introduced evidence that State Farm had engaged in a nationwide scheme to reduce costs in all types of consumer insurance. *Id.* at 420-22.

109. See Sharkey, *supra* note 31, at 361-62.

pensatory damages would be to place them within the category of compensation.

*Gore* does not provide much of an answer. Justice Stevens analyzed past conduct as an indicator of the defendant's "disrespect for the law," and disrespect for the law was taken to be a measure of the reprehensibility of the defendant's act, one of the three *Gore* factors.<sup>110</sup> Justice Stevens noted that disrespect for the law is only one among a number of factors that informs reprehensibility.<sup>111</sup> The nature of the injury caused by the defendant was of primary importance—whether, for example, the defendant's act caused personal injury or some other harm, such as financial injury or destruction of property. In *Gore*, for example, one of the most important considerations mitigating against high punitive damages was that the defendant's act of concealment caused only minor economic harm.<sup>112</sup>

*Gore* did say, however, that "disrespect for the law" is one element of reprehensibility.<sup>113</sup> The reason for this is obvious: If punitive damages serve a deterrent function, it would make sense to sanction those who knowingly flout the law, regardless of the consequences that flow from their choices. Even the most rational wrongdoer cannot be certain of the particular results of their wrongdoing. Minor offenses from an *ex ante* perspective may result, *ex post*, in unexpectedly large social losses. Furthermore, there may be spillover effects from minor wrongdoing. Respect for law among others may be weakened, and the wrongdoer herself may be emboldened to pursue further, larger wrongs. From a retributive point of view, the argument for punishing wrongdoing regardless of consequences is more direct. A knowing violation of society's rules is an act of disrespect towards the victim and towards society. The victim has a direct interest in retribution, either because he has suffered a palpable psychic or hedonic loss, or because of a moral injury for which damages for pain and suffering cannot account.<sup>114</sup> Some might argue that the state itself may have an interest in retribution for the violation of its rules, regardless of conse-

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110. *Gore*, 517 U.S. at 576-77.

111. *Id.* at 575-77. The Court defined the term "degree of reprehensibility" variously as "enormity of [the] offense" (quoting *Day v. Woodworth*, 54 U.S. 363, 371 (1852)) and "[t]he flagrancy of the misconduct" (quoting David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 387 (1994)). *Gore*, 517 U.S. at 575 & n.23.

112. *Gore*, 517 U.S. at 576.

113. *Id.* at 577.

114. *E.g.*, Galanter & Luban, *supra* note 31, at 1432-40; Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1685-86 (1992).



quence, simply because the state as an entity has an interest in respect.<sup>115</sup>

Disrespect for the law can be evidenced by the defendant's conduct as it relates to the act causing the injury. It can also be evidenced by conduct before the act. As Justice Stevens noted in *Gore*, "[c]ertainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."<sup>116</sup> But what past acts should count as evidence of the defendant's attitude when they committed the act that injured the plaintiff? Justice Stevens expanded on his claim that evidence of past knowledge of wrongdoing was relevant to ascertaining "disrespect" by noting that "[o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance."<sup>117</sup> Justice Stevens illustrated this point by citing *Gryger v. Burke*,<sup>118</sup> a 1948 case that upheld a Pennsylvania sentencing law similar to the "three strikes and you're out" laws passed recently in a number of states.<sup>119</sup> In *Gryger*, however, there was no question that the defendant had been the subject of at least four criminal proceedings.<sup>120</sup> Could Justice Stevens have really meant that, in order to measure the disrespect exhibited by BMW towards the people of Alabama, Gore had to show that BMW was literally a recidivist?

The Court seemed satisfied that the evidence presented by Gore at trial established BMW's repeated disrespect for Alabama's fraud law.<sup>121</sup> It is not clear whether it would have mattered, in establishing that fact, whether there had been ten or fourteen or one hundred BMW customers who had been harmed in the same way that Gore had been harmed. By noting that fourteen other Alabamans had been the target of BMW's wrongful act,<sup>122</sup> the Court could not have been claiming that fourteen other Alabamans were legally injured by BMW's act.

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115. See, e.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 164-65 (Wis. 1997) (finding that a \$100,000 punitive damages award where the jury awarded \$1 nominal damages was not excessive under *Gore* where the defendant "brazen[ly]" and "intentional[ly]" trespassed on another's land, thus exhibiting "reckless disregard for the law").

116. *Gore*, 517 U.S. at 576-77 (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28 (1993)).

117. *Id.* at 577.

118. 334 U.S. 728 (1948).

119. *Id.* at 731.

120. *Id.* at 730.

121. *Gore*, 517 U.S. at 577-80.

122. *Id.* at 564.

Too many hurdles, many of them highly technical, would have to be cleared to know whether any one of those fourteen customers were legally harmed and by how much. Some of the customers may have allowed the statute of limitations to run on their claims, some may have been estopped from raising their claims, and some may have failed to mitigate any damages. These technical questions may not be relevant from the perspective of judging the attitude of BMW when it set out to defraud in Alabama, but they would be considered relevant by a court charged with determining whether, as a matter of tort law, any single victim suffered a legal harm.<sup>123</sup>

One might say, therefore, that when Justice Stevens said that the inquiry into a defendant's disrespect towards the law allows a court to review evidence of past acts, he meant that the question should include past acts that illustrate attempted wrongs, regardless of whether they resulted in legally cognizable injuries. If this is correct, then the relationship between the attempted wrong (which is what the court needs to ascertain) and the number of victims (and the depth of their actual injuries) must be viewed in a new light. Justice Kennedy said that *Gore* prevented courts from taking into account "other parties' hypothetical claims."<sup>124</sup> An "attempted tort" is hypothetical, but in a different way than the unproven legal injury of the fourteen other Alabaman BMW customers is hypothetical. Their claims are hypothetical because the legal predicates upon which they are based simply have not been established (although they might have been). An attempted tort is hypothetical as regards to the victims it could have harmed (that is why, unlike in criminal law, there is no cause of action for attempted tort). However, whether or not the defendant acted with a certain attitude when he harmed the plaintiff is not hypothetical. That is a matter of fact that can be established by the factfinder at trial. If we believe that this attitude should matter to the selection or application of the penalty the plaintiff can impose on the defendant,

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123. These potential plaintiffs might not have sued because they were unaware of their injury. BMW's wrong may have created what Sharkey calls "diffuse harms": harms that are too small for any single party to notice or were not noticed because the defendant actively concealed his wrongdoing. Sharkey, *supra* note 31, at 400. On the other hand, these potential plaintiffs might not have had a right to damages even had they sued. As Galligan has noted, "there are legal doctrines that serve normative goals consistent with an individual model of tort law, but that lead to significantly less-than-optimal deterrence." Galligan, *Deterrence and Punishment*, *supra* note 42, at 139.

124. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003).

then the plaintiff's invocation of past similar acts does not involve a hypothetical claim.<sup>125</sup>

This way of understanding the role of past acts in order to determine reprehensibility limits the sort of evidence that might be acceptable. Only evidence that is probative of the attitude of the defendant when engaged in the act that harmed the plaintiff should be considered permissible under the Due Process Clause. More importantly, the actual consequences of a past similar act are in themselves irrelevant, except to the extent that they inform the factfinder about the defendant's attitude when they did the act that harmed the plaintiff.<sup>126</sup>

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125. Of course, one might take the position that penalties should never be imposed by private litigants. See, e.g., Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1 (2004). Redish and Mathews' argument is based on both a specific reading of the political theory they believe sits behind the Constitution, and a historical account of punitive damages identical to that offered by the Supreme Court in *Cooper*, which postulates a change in the function of punitive damages from personal compensation to retribution. *Id.* at 13-19. As they note, there has been in American law a tradition of civil penalties parallel to the tradition of punitive damages; those penalties have always functioned to provide both retribution and deterrence, yet do not trigger the protections that would normally accompany a criminal sanction. *Id.* at 20. Redish and Mathews suggest that the category of civil fines is itself constitutionally suspect, but that in any case the distinctive feature of modern punitive damages—that they permit private litigants to take over the role of the state in pursuing civil penalties—make them constitutionally suspect. *Id.* at 19-21.

126. See *Campbell*, 538 U.S. at 422-23; *Gore*, 517 U.S. at 575-77. Unfortunately, the Supreme Court's instructions to the lower courts about how to handle evidence about reprehensibility has consisted mostly in discussing what *not* to include. For example: "The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period." *Campbell*, 538 U.S. at 424.

Thomas Colby has offered a few useful suggestions in his excellent critique of "total harm" punitive damages (which are quite similar to socially compensatory damages):

The jury can consider evidence of additional wrongdoing as a means of providing some context for the harm at issue, so as to determine whether the individual wrong to the victim is more reprehensible when considered in light of the defendant's entire course of conduct. It may not, however, punish the additional harm. . . .

Nor should the jury attempt to take away the profits that accrued to the defendant as the result of wrongs not at issue. . . .

. . . It [should] not ask how many other wrongs the defendant committed, and it [should] not concern itself with whether or not the defendant will, in fact, escape liability for other wrongs.

Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 666-69 (2003).

## V. WHAT NOW FOR SOCIALLY COMPENSATORY DAMAGES?

The hard question raised by Judge Calabresi in *Ciraolo* should not be avoided simply because the Supreme Court has created an almost “impenetrable barrier to punitive damages” in *Newport*.<sup>127</sup> As a number of critics have pointed out, the Court’s reasons for creating a special test for municipalities is hard to justify, except on the ground that municipalities are financially vulnerable.<sup>128</sup> There are at least two reasons for allowing punitive damages against municipalities. First, like corporations and other organizations, municipalities are likely to respond to penalties since the leaders of an organization must ultimately answer to its members for the expenses incurred in its name. Therefore, the goal of deterrence, which is one function of punishment, could be served by a punitive damage award.<sup>129</sup> A second function, which has not been discussed in this Article, is that punitive damages paid by a municipality to a victim of an intentional or reckless violation of rights could serve as a form of “satisfaction” for the victim. Redress obtained in this way is not monetary payment for emotional distress, which is what the *Cooper* Court mistakenly assumed punitive damages once provided.<sup>130</sup> It is instead a form of personal retribution that, unlike private revenge, is carefully controlled (and facilitated) by the state.<sup>131</sup> There are different theories of what retribution in private law might mean, and for purposes of this Article there is no need to choose among them.<sup>132</sup> What is important is that

127. *Webster v. City of Houston*, 689 F.2d 1220, 1231 (5th Cir. 1982) (Goldberg, J., specially concurring), *rev’d on other grounds*, 735 F.2d 838 (5th Cir. 1984) (en banc).

128. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 871-73 (2001); Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 866 (1996); Gloria Jean Rottell, Note, *Paying The Price: It’s Time To Hold Municipalities Liable for Punitive Damages Under 42 U.S.C. § 1983*, 10 J.L. & POL’Y 189, 203 (2001).

129. See Gilles, *supra* note 128, at 873.

130. See *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 437 n.11 (2001).

131. See Galanter & Luban, *supra* note 31, at 1432-33 (citing Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY 111 (Jean Hampton & Jeffrie G. Murphy eds., 1988)). Whether or not retribution is an appropriate goal in criminal punishment is really a two-part question: first, whether retribution is ever an appropriate goal for the law to pursue, and second, if it is, whether it is an appropriate goal for the state to pursue. One need not take a position on the latter question in order to endorse a retributive function for punitive damages.

132. Galanter and Luban adopt a view that retribution in private law is a form of moral rebalancing. See *id.* Hampton argued that retribution involves correcting a false claim, made by the defendant through his or her action, about the moral value of the plaintiff, and that it is this “moral injury” that has to be annulled. Hampton, *supra* note 114, at 1679. The German conception of “satisfaction damages” (*Genugtuung*) has its roots in the nineteenth-century idea that there can be injuries to honor, which are quite different from emotional distress or pain (*Schmerzensgeld*). See Volker Behr, *Punitive Damages in American*

the justification for private retribution is no different when the author of a victim's injury is the state, and not a private individual or a corporation.

Judge Calabresi bemoaned that, because of *Newport*, punitive damages could not be awarded to Debra Ciraolo.<sup>133</sup> But what if they could have been awarded? Had the Supreme Court allowed the City of New York to be treated like Ford Motor Company, this Article has shown that the jury's award to Ciraolo would have been a penalty, not compensation, and thus would have been subject to the due process constraints articulated in *Gore* and later in *Campbell*. The jury that decided Ciraolo's suit awarded her a \$5 million punitive damages award in addition to her \$19,645 award for emotional distress.<sup>134</sup> Once the theory of socially compensatory damages is taken off the table, what would happen to the \$5 million award, were *Newport* overruled or modified?

In *Campbell*, Justice Kennedy warned that "[s]ingle-digit multipliers are more likely to comport with due process" than ratios of ten or higher.<sup>135</sup> He also admitted that, "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'"<sup>136</sup> Since *Campbell*, state and federal courts have been reviewing punitive damages awards and, guided by Justice Kennedy's words, have been reducing awards that stand at ratios higher than ten to one.<sup>137</sup>

It is ironic that the Supreme Court's chief contribution to the debate over how to bring punitive damages into conformity with due process has been the imposition of a draconian ratio. The actual ratio

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and German Law—Tendencies Towards Approximation of Apparently Irreconcilable Concepts, 78 CHI.-KENT. L. REV. 105, 127-36 (2003). There are nuanced differences between these views, which deserve to be treated in another article. See Anthony J. Sebok, Legal Culture and the Desire for Retribution: Punishment in German and American Private Law (2002) (unpublished manuscript, on file with author).

133. See *Ciraolo v. City of New York*, 216 F.3d 236, 238 (2d Cir. 2000).

134. *Id.* at 237.

135. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

136. *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996)).

137. For a discussion of some of those cases, see Erwin Chemerinsky & Ned Miltenberg, *The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases*, 36 ARIZ. ST. L.J. 513 (2004). One California Court of Appeals case analyzed by Chemerinsky and Miltenberg is *Romo v. Ford Motor Co.*, in which the same three-judge panel that had previously upheld the jury's \$290 million punitive damages award reduced the award on remand to \$23.7 million. 6 Cal. Rptr. 3d 793 (Ct. App. 2003). The panel assumed that *Campbell* required that punitive damages could not be more than nine times the actual damages. *Id.* at 803; Chemerinsky & Miltenberg, *supra*, at 525.

it chose is less important than the decision to link the concept of a ratio to the process of measuring the fairness of a penalty. The choice is ironic because the escape route adopted by Judge Calabresi, which was supposed to provide a foundation for extracompensatory damages that did not run afoul of due process, is also a ratio. For Judge Calabresi, if a punitive damages award equaled the injury suffered by the plaintiff multiplied by the number of plaintiffs not able to sue, the resulting amount was not a penalty, but fair social compensation.

## VI. CONCLUSION

This Article has argued that the ratios recommended by the theory of socially compensatory damages must be subjected to the same due process scrutiny as any private penalty. There is no reason to believe, however, that a retreat into the ratio recommended by *Campbell* will provide guidance worthy of due process. A number of courts have already found various methods to avoid the upper limit of the single-digit ratio set up by the Supreme Court.<sup>138</sup> Furthermore, just because the correct measure of the size of the penalty Debra Ciraolo could impose on the City of New York was not the sum of all the injuries

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138. See *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676, 678 (7th Cir. 2003) (justifying a 37:1 ratio between a \$186,000 punitive award and a \$5,000 compensatory award based on potential victims who were never compensated by the defendant); *In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1099-1110 (D. Alaska 2004) (finding a \$5 billion punitive damages award not excessive if compared against \$513 million in monies paid by the defendant to settle other parties' suits rather than the \$20 million in compensatory damages awarded by the court in the lawsuit); *Dunn v. Village of Put-In-Bay, Ohio*, No. 3:02CV7252, 2004 U.S. Dist. LEXIS 882, at \*1, \*5-6 (N.D. Ohio Jan. 26, 2004) (deciding that, despite a 15:1 ratio, the \$23,422.50 punitive award was not excessive because the \$1,577.50 compensatory award was "nominal" in nature); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, No. 00-5481, 2003 U.S. Dist. LEXIS 9558, at \*2-3, \*8 (E.D. Pa. July 21, 2003) (upholding a \$150,000 punitive damages award where the court awarded \$2,000 in compensatory damages because the potential harm to the plaintiff was \$150,000, and that ratio would be 1:1); *Myers v. Workmen's Auto Ins. Co.*, 95 P.3d 977, 982-83, 991-92 (Idaho 2004) (upholding a \$300,000 punitive damages award because a \$2,171.85 compensatory award was "nominal"); *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 54-55 (Ky. 2003) (upholding a ratio that was more than 11:1 due to the low amount of compensatory damages that could not adequately punish and deter the defendant's conduct); *Madeja v. MPB Corp.*, 821 A.2d 1034, 1050-51 (N.H. 2003) (upholding a 35:1 ratio in a sexual harassment case and noting that the measurement of compensatory to punitive damages is not limited to an exact mathematical calculation); *Williams v. Philip Morris, Inc.*, 92 P.3d 126, 144-46 (Or. 2004) (finding that a \$79 million punitive award, which resulted in an approximate 96:1 ratio, was actually closer to 4:1 ratio given the hypothetical damages caused to nonplaintiffs, and was not excessive); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 421-22 (Pa. Super. Ct. 2004) (imposing a 10:1 ratio was close to the *Campbell* limit and did not violate due process); *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 661 N.W.2d 789, 794, 803-04 (Wis. 2003) (upholding a punitive damages award of \$3.5 million in a bad faith case because the defendant-insurer exposed the plaintiff to \$490,000 in potential liability).

hypothetically caused by its wrongdoing, there is no reason to believe that the correct measure of the penalty was necessarily less than \$196,450 (ten times the amount of compensatory damages awarded). The jury thought the right amount was \$5 million, approximately two hundred fifty times the compensatory damages awarded. In this Article, I take no position on whether a \$5 million punitive damages award would have been excessive, from the perspective of due process, or inappropriate, given the various functions of punitive damages. All I argue in this Article is that the right way to measure the scale of the punitive damages award—whether from the perspective of determining whether the amount exceeded the limits of constitutional permissibility or whether the amount was properly scaled to fit the purpose of the award—is not going to be found in any method that focuses the court's inquiry on hypothetical losses caused by the defendant to hypothetical plaintiffs.<sup>139</sup>

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139. *Mathias* illustrates the practical difficulties of asking questions about hypothetical damages. The plaintiffs had been bitten by bedbugs in the defendant's hotel. *Mathias*, 347 F.3d at 673. At trial, the plaintiffs offered evidence that the defendant, in an attempt to save money, refused to have the hotel's bedbug infestation cured. *Id.* at 674-75. The court awarded \$5,000 in compensatory damages, as well as \$186,000 in punitive damages. *Id.* at 674. Judge Richard Posner upheld the award in spite of *Campbell's* "single-digit" ratio test, with the following argument:

[Plaintiffs] were given Room 504, even though the motel had classified the room as "DO NOT RENT UNTIL TREATED," and it had not been treated. Indeed, that night 190 of the hotel's 191 rooms were occupied, even though a number of them had been placed on the same don't-rent status as Room 504. One of the defendant's motions in limine that the judge denied was to exclude evidence concerning all other rooms—a good example of the frivolous character of the motions and of the defendant's pertinacious defense of them on appeal.

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All things considered, we cannot say that the award of punitive damages was excessive, albeit the precise number chosen by the jury was arbitrary. It is probably not a coincidence that  $\$5,000 + \$186,000 = \$191,000/191 = \$1,000$ : i.e., \$1,000 per room in the hotel.

*Id.* at 675, 678. If a court were to uphold the award on the basis of a "hypothetical damages" argument, would it not be incumbent on the plaintiff to discover how many of the customers who occupied the other 189 rooms suffered an injury? If that task was impossible, then was it not incumbent on the plaintiff to develop a scientific estimate of the sum of the wrongs that were hypothetically caused by the defendant? Naturally, one question that one might ask, if the plaintiff attempted such an understanding, is how a technique designed to answer the question of hypothetical harm caused by hypothetical wrongs is different from a class action. See Sharkey, *supra* note 31, at 404 (arguing that punitive damages representing "societal damages" may be a "poor man's class action").

Some of these questions parallel questions raised above in the discussion of the attempted torts discussed in *Gore*. See *supra* text accompanying note 123. For example, while it may seem obvious that anyone who had been bitten by bedbugs in the defendant's hotel suffered an injury at the hands of the defendant, this conclusion assumes that each of the hypothetical victims, if they had brought a suit, would have had a valid claim, identical in every way to the actual plaintiff who brought the suit. While it is hard to know how the

What is missing from the contemporary debate over punitive damages is a recognition that the right answer to the question “How large should punitive damages be?” is not going to come from a ratio or any other pseudo-objective test. This admonition may not comfort those who believe that the greatest problem with punitive damages is their absolute size, and who therefore welcomed *Campbell* for no other reason than that it was a Procrustean solution that cut off high awards.<sup>140</sup> But we have a deeper problem in punitive damages jurisprudence—one of a failure of theory. In the absence of a serious, normative theory about the purpose of punitive damages within their own terms—e.g., as a unique form of private penalization—advocates from all sides of the debate have little or nothing else to recommend to juries other than ratios. In *Romo v. Ford Motor Co.*, for example, the attorneys for the plaintiffs successfully persuaded the jury that the defendant, Ford, had engaged in an act so reprehensible that it was the functional equivalent of manslaughter.<sup>141</sup> And yet, when it came time to argue to the jury over the size of the penalty that the Romo family should impose on Ford, the lawyers did not ask the jury to focus on the relationship between the penalty and the wrong done to the Romos. The lawyers instead reverted to a ratio: they argued that “\$1 billion was the appropriate award, based on the profit Ford made on all 1978-1979 Broncos, factored to reflect Ford’s use of that money over the next 20 years.”<sup>142</sup>

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usual defenses might have affected the hypothetical plaintiffs whom, according to Judge Posner, the jury might have been considering when they arrived at a \$1,000 per room penalty, it seems a little unreal that the plaintiffs, if they really existed, would all have had valid cases.

140. For example, the American Tort Reform Association declared that, in the wake of *Campbell*, “the plaintiffs’ lawyers’ golden goose for punitive damages is now dead.” Press Release, American Tort Reform Association, U.S. Supreme Court Action Confirms: Last Month’s Opinion on Punitive Damages Applies to Product Liability Cases (May 19, 2003), available at [www.atra.org/show/7561](http://www.atra.org/show/7561). It is not clear that, in fact, restricting punitive damages to ratios below 10:1 would have a significant effect on either the total number of punitive damages awards or the total dollars awarded to plaintiffs in punitive damages awards. Research suggests that punitive damage awards are very rarely awarded in ratios higher than ten. Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 755-57 & tbl.2 (2002); see also THOMAS H. COHEN & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTRIES, 2001, at 7 (Bureau of Justice Statistics Bulletin No. NCJ 202803, 2004) (stating that only 14% of all punitive damages in tort cases were awarded at ratios of four times compensatory damages or higher), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf>.

141. 122 Cal. Rptr. 2d 139, 164 (Ct. App. 2002). Whether Ford’s design defect and the decisions leading to the death of the plaintiff deserved this characterization is not relevant.

142. *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 805 (Ct. App. 2003).



There may be an argument that would allow a jury to equate the Romos' desire to impose a penalty against Ford for what was done to them with the penalty their lawyer asked for—which was the forfeiture of the gains that Ford acquired by acting wrongfully towards a hypothetical class of victims—but that argument has not yet been developed, and the argument from ratio instead seems to be the plaintiffs' bar's default choice. We should therefore not be surprised that, when it came time to respond to the plaintiffs' bar's aggressive use of ratios, the Supreme Court responded with a ratio of its own. This Article has not taken on the task of demonstrating why rigid ratio-based limits on punitive damages are inconsistent with the history and goals of punitive damages in the American tort system. A full critique of the ratio-based solution to the societal damages argument pressed by the plaintiffs in *Campbell* would properly be part of a larger project that offered an alternative model for the determination of punitive damages in common-law courts. I would like to conclude this Article by noting that the approach dominating the current state of debate about punitive damages—whether for the purposes of instructing juries, persuading appellate courts, or debating tort reform—seems to resemble a version of Gresham's Law, where bad arguments about punitive damages—those seeking to anchor them in a ratio—appear to drive out the possibility of good arguments—those based on deeply felt principles of justice.<sup>143</sup>

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143. As a result, the current system of punitive damages remains highly unpredictable. As Kahneman, Schkade, and Sunstein have noted, the participants in the experiments they conducted with mock juries displayed “a remarkably high level of moral agreement” even as they produced “highly erratic” and “arbitrar[y]” punitive damage awards. Daniel Kahneman et al., *Shared Outrage, Erratic Awards*, in *PUNITIVE DAMAGES: HOW JURIES DECIDE* 31, 31 (Cass R. Sunstein et al. eds., 2002).